

D.P.U. 91-234-J

Petition of Commonwealth Electric Company and Cambridge Electric Light Company, pursuant to M.G.L. c. 164, §§ 69I, 76, 94, and 220 C.M.R. §§ 10.00 et seq., for review of the procedures by which additional energy resources are planned, solicited, and procured by Commonwealth Electric Company and Cambridge Electric Light Company.

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I. INTRODUCTION

On April 1, 1994, Commonwealth Electric Company ("Commonwealth") and Cambridge Electric Light Company ("Cambridge") (together, "Companies") submitted their integrated resource management ("IRM") Phase III filing to the Department of Public Utilities ("Department") for review. On May 31, 1994, the Department issued its Order on the Companies' Phase III filing. See Commonwealth Electric Company and Cambridge Electric Light Company, D.P.U. 91-234-B (1994) ("D.P.U.91-234-B").¹ On June 3, 1994, the Companies submitted their Phase IV filing to the Department for review,² and on June 30, 1994, the Department issued its Order in review of the Companies' filing.³ See Commonwealth Electric Company and Cambridge Electric Light Company, D.P.U. 91-234-C (1994) ("D.P.U. 91-234-C").

Because there were no competing proposals submitted to provide services in the new construction market sectors, the resource plan approved by the Department in Phase III included new construction programs offered by Cambridge and Commonwealth in all sectors. D.P.U. 91-234-B at 31 (1994). The Department stated that it would review the Companies'

¹ On August 3, 1994 and September 2, 1994, the Companies submitted supplemental filings to the Department requesting to modify the Department-approved award groups. On September 27, 1994, the Department issued its Order on the Companies' requests. See Commonwealth Electric Company and Cambridge Electric Light Company, D.P.U. 91-234-G (1994).

² The Companies supplemented their Phase IV filing with additional contracts with project developers for Department review on June 21, 1994, June 29, 1994, August 24, 1994, October 5, 1994, and November 7, 1994.

³ See Commonwealth Electric Company and Cambridge Electric Light Company, D.P.U. 91-234-C (1994). See also Commonwealth Electric Company and Cambridge Electric Light Company, D.P.U. 91-234-D, D.P.U. 91-234-F, D.P.U. 91-234-H, and D.P.U. 91-234-I (1994).

new construction programs and determine whether program designs and budgets are consistent with the public interest. D.P.U. 91-234-C at 7. In Section II of this Order, the Department reviews the Companies' new construction programs.

In addition, SESCO, Inc. ("SESCo") has petitioned the Department pursuant to 220 C.M.R. § 10.06(2)(j) and 220 C.M.R. § 10.07(3) to review contract negotiations between Commonwealth and SESCO in Commonwealth's residential non-electric heat sector. In Section III of this Order, the Department addresses the petition of SESCO. In this Section, the Department will also address Commonwealth's and Cambridge's proposals to add their programs to replace the SESCO proposals.⁴

II. PHASE IV REVIEW

A. Standard of Review

Pursuant to 220 C.M.R. § 10.06(1), all electric company resource proposals that are part of the approved resource plan (i.e., the Companies' new construction programs) shall be reviewed by the Department pursuant to 220 C.M.R. §§ 9.00 et seq. See D.P.U. 89-239 (1990). See also, D.P.U. 86-36-F (1988); D.P.U. 86-36-G (1989). To the extent that an electric company has solicited proposals to provide capacity or energy, the results of the solicitation shall be submitted as evidence regarding the issue of whether the proposal will result in positive net present value benefits. 220 C.M.R. § 9.03(1)(d).

The Department has developed a set of guidelines for electric and gas companies

⁴ As the result of a contract dispute, the Companies notified the Department that they had terminated contracts in the Cambridge residential non-electric heat and residential electric heat market sectors.

when designing their conservation programs. Such guidelines include cost-effective design, minimization of lost opportunities and free riders, and flexibility to account for changes over time. See Cambridge Electric Light Company and Commonwealth Electric Company, D.P.U. 92-218, at 10 (1993); Boston Edison Company, D.P.U. 90-335, at 26 (1992). The Department also has required electric and gas companies seeking Department approval of recovery of program costs and lost base revenues to provide sufficient information regarding a variety of elements of program designs.⁵ Such elements include, but are not limited to, expected participation rates, savings per participant, implementation rate of major energy conserving measures, and timeframe of implementation. Id. at 27-51.

B. Residential New Construction Programs

The Companies proposed to implement the Residential New Construction Programs ("RNCP") to capture lost opportunities associated with new home construction in the residential heat and non-heat market segments of both the Commonwealth and Cambridge service territories (Exh. C-III-1A, Appendix I, Company Initial Resource Portfolio, Section 3, at 1). The RNCP would use the Energy Crafted Home Program ("ECHP") as the program design and delivery mechanism (id.). The ECHP offers financial incentives to bidders based on the energy performance of a new home, a certification process, and an on-going monitoring and evaluation of installed savings (id.). The ECHP provides other incentives for builders to participate, including program flexibility, training benefits, and

⁵ The Department notes that approval of program design and budget is not required where implementation of a DSM program is awarded to an energy service company or customer that is then required to develop the DSM resource as that party proposed.

improving new home marketability (id.). The Companies stated that current new home construction activity is extremely limited, so that the RNCP is not scheduled for implementation until year three of this IRM cycle, provided that the volume of new home construction activity at that time is sufficient to support cost-effective implementation of the program (id.).

The Companies identified additional steps that would need to be completed before the RNCP could be implemented (Exh. DPU-IV-2-9). The Companies plan to (1) review the program implementation experiences of residential new construction program participants in New England and elsewhere in the United States; (2) incorporate modifications to the program concepts based on this review and request Department approval of such modifications; (3) develop program technical standards, program implementation requirements, application forms and tracking requirements, and marketing and promotional materials; (4) meet with trade allies to introduce, explain, and promote the program; and (5) announce program introduction (id.).

C. Commercial and Industrial New Construction Programs

The Commercial and Industrial ("C/I") New Construction Programs were designed to improve the energy efficiency of commercial and industrial facilities during the construction of such or when C/I customers undertake major renovation or remodelling projects (id., Section 7, at 2 and Section 9, at 2). The program would be marketed to developers, architects, engineers, contractors, trade groups and suppliers (id.). All C/I customers and occupants of high-rise residential developments would be eligible to participate in the program (id.). End-use measures addressed by the program include lighting, electric water

heating, motors, building envelope, space conditioning, and refrigeration (id.). The Companies plan to retain the services of a technical expert to provide guidance and technical assistance in the design of specific projects (id.).

The Companies would use the Massachusetts Building Code as the baseline efficiency level from which to calculate rebate incentives offered to participating customers (id.). The rebate incentive would finance the incremental cost of equipment (i.e., the cost differential between standard and high efficiency equipment) minus a customer contribution equal to the dollar value of one year of customer bill savings. The Companies indicated that, because the volume of new construction in the C/I sectors in their service territories is relatively low, they intend to focus initially on the renovation and remodelling markets (id.).

The Companies did not provide detailed budgets of the program for their respective service territories, detailed avoided cost information for their respective systems, expected annual and total participation levels, expected annual and total rate of installation of major categories of energy conservation measures ("ECMs"), or the annual and total percentage of energy conserved by each category of ECMs (Exh. DPU-IV-3-1).⁶ The Companies provided outdated milestone information of the planned implementation schedule.⁷ In response to the Department's request for annual and total detailed budget information, the Companies

⁶ The Companies provided limited information on their proposed retrofit and new construction programs aggregated for each rate class in their service territories (Exh. DPU-IV-3-1A). The information provided was identical to that provided in the Companies' original RFP (id.).

⁷ In response to the Department's request for updated milestone information, the Companies provided information from the initial resource portfolio (Exh. D.P.U.-IV-3-1).

indicated that, because the new construction market was experiencing a downturn and the Companies have had no previous experience in implementing a new construction program, the Companies' bid reflects a gradual increase in implementation of the program.

Therefore, the Companies contended that a detailed budget for the new construction program was not available (id.).

D. Analysis and Findings

The resource plan approved by the Department in Phase III included new construction programs offered by Cambridge and Commonwealth in all sectors. While these programs were the result of a competitive solicitation, there were no competing proposals submitted to provide services in these market sectors. Therefore, the results of the solicitation are not dispositive on the issue of whether the programs will result in positive net present value benefits.⁸ Accordingly, the Department must review the Companies' new construction programs. However, the Companies have not submitted adequate program design and budget information. Therefore, the Department does not approve the Companies' proposal to implement its new construction programs.

The Department expects the Companies, in their next Phase I IRM filing, to provide sufficient and accurate information, updated as appropriate, regarding the customer market their DSM programs target, expectations of participation rates and measure implementation, and accurate estimates of the timing of program implementation for all of the Companies'

⁸ On February 24, 1995, the Companies filed proposed conservation charges to be applied April 1, 1995 through June 30, 1995. In that filing, the Companies indicated that their new construction programs may not be cost-effective without environmental externalities.

proposed programs.

III. PETITION OF SESCO

A. Procedural History

On December 23, 1994, SESCO, Inc. ("SESCO") petitioned the Department pursuant to 220 C.M.R. § 10.06(2)(j) and 220 C.M.R. § 10.07(3) to review contract negotiations between Commonwealth and SESCO in Commonwealth's residential non-electric heat sector and requested that the Department schedule a hearing on the matter as soon as practicable (SESCO's December 23, 1994 Petition at 7). SESCO also requested that the Department issue an interim order prohibiting Commonwealth from replacing SESCO in the award group pending resolution of this matter (*id.*). On January 17, 1995, Commonwealth submitted a response in opposition to SESCO's December 23, 1994 Petition stating, among other things, that SESCO's unilateral action fails to comply with the jurisdictional requirements of 220 C.M.R. § 10.06(2)(j); the Department should exercise its discretion under 220 C.M.R. § 10.07(3) to dismiss SESCO's December 23, 1994 Petition; and because Commonwealth and SESCO had not reached agreement on contract terms,⁹ Commonwealth intends to replace SESCO's proposal in Commonwealth's award group (Commonwealth's January 17, 1995 Response at 21).¹⁰

⁹ Commonwealth stated that its declaration that contract negotiations are at an impasse results from extensive negotiations with SESCO (Commonwealth's January 17, 1995 Response at 13).

¹⁰ Specifically, Commonwealth requested Department approval to replace SESCO's proposal with that of Commonwealth's proposal from its initial resource portfolio (Commonwealth's January 17, 1995 Response at 21).

On January 20, 1995, SESCo submitted a Motion to Strike Commonwealth's January 17, 1995 Response (SESCo's January 20, 1995 Motion at 2),¹¹ and renewed the requests in its December 23, 1994 Petition.¹² On January 24, 1995, Commonwealth submitted a response to SESCo's January 20, 1995 Motion stating that it understood its January 17, 1995 filing to be timely and that SESCo has not been prejudiced by the timing of Commonwealth's January 17, 1995 Response (Commonwealth's January 24, 1995 Response at 1-2).¹³ In the alternative, Commonwealth submitted a Motion for Summary Judgment (Commonwealth's January 24, 1995 Motion), and requested that its January 17, 1995 Response be considered a memorandum in support of its motion (id. at 2).

On February 1, 1995, the Department directed Commonwealth and SESCo to continue negotiations for an additional 30 days and stated that, consistent with the IRM regulations, SESCo could not lose its place in the award group unless ordered by the Department. In addition, the Department allowed SESCo to reply to Commonwealth's January 17, 1995 Response. On February 10, 1995, SESCo submitted a reply to Commonwealth's January 17, 1995 Response (SESCo's February 10, 1995 Reply) stating

¹¹ As grounds for its motion, SESCo stated that Commonwealth's January 17, 1995 Response is untimely (SESCo's January 20, 1994 Motion at 2).

¹² As an alternative to a hearing on the matter, SESCo requested an opportunity to reply to Commonwealth's January 17, 1995 Response (SESCo's January 20, 1995 Motion at 3).

¹³ In addition, Commonwealth stated that it was concerned about its request to replace the SESCo proposal with the Commonwealth proposal from its initial resource portfolio because the program may not be cost-effective without environmental externalities, citing Massachusetts Electric Company v. Department of Public Utilities, 419 Mass 239 (1994) (Commonwealth's January 24, 1995 Response at Cover Letter).

that Commonwealth's contract demands are contrary to the terms of the RFP, the Department's regulations, and its bid.¹⁴ On February 17, 1995, Commonwealth submitted additional comments in response to SESCO's February 10, 1995 Reply (Commonwealth's February 17, 1995 Response) stating that SESCO has failed to demonstrate that Commonwealth's contract demands were inconsistent with the Department's directives or resulted in any failure to secure programs that provide exceptional value for customers.¹⁵

On February 23, 1995, Cambridge advised the Department that it had terminated a contract with SESCO in Cambridge's residential non-electric heat sector for failure to comply with the terms and conditions of the agreement (Cambridge's February 23, 1995 Filing).¹⁶ In addition, Cambridge stated that, given the possible applicability of an arbitration provision, it was considering the appropriate treatment of a failure to comply with terms and conditions of a contract with SESCO in Cambridge's residential electric heat sector (*id.*). As a result, Cambridge stated that it was considering the addition of its proposal from its initial

¹⁴ Specific issues under contention include the program completion security, the front loading security, and the level of payment obligation for energy savings delivered in any single year (SESCO's February 10, 1995 Reply at 3).

¹⁵ Specifically, Commonwealth contends that the program completion security and the front loading security are consistent with the RFP, and are appropriate and necessary in order for Commonwealth to secure exceptional value for its customers (Commonwealth's February 17, 1995 Response at 3-6). In addition, Commonwealth repeated its concern that its proposal from its initial resource portfolio may not be cost-effective (*id.* at 1).

¹⁶ On January 30, 1995, Commonwealth advised the Department that it had delivered a Notice of Termination to SESCO with respect to contracts in Cambridge's residential electric and non-electric heat sectors. On February 6, 1995, SESCO submitted comments in response to Commonwealth's January 30, 1995 notice.

resource portfolio as a replacement resource in the Cambridge non-electric heat sector.¹⁷

On March 1, 1995, SESCO submitted a Motion to Strike Commonwealth's February 17, 1995 Response stating that the filing was not provided for in the Department's February 1, 1995 letter (SESCO's March 1, 1995 Motion to Strike). In addition, SESCO requested that the Department reconsider SESCO's request for an evidentiary hearing (SESCO's March 1, 1995 Motion to Strike at 2). On March 8, 1995, Commonwealth submitted comments in response to SESCO's March 1, 1995 Motion to Strike requesting that the Department deny SESCO's motion (Commonwealth's March 8, 1995 Response). In addition, Commonwealth stated that contract negotiations pursuant to the Department's February 1, 1995 directive have not resulted in an energy savings agreement with SESCO (Commonwealth's March 8, 1995 Response at 1-2).¹⁸ On March 10, 1995, SESCO submitted comments on the negotiations that had taken place pursuant to the Department's February 1, 1995 directive and stated that Commonwealth had failed to negotiate in good faith (SESCO's March 10, 1995 Comments).¹⁹ On March 15, 1995, Commonwealth submitted comments in response to SESCO's March 10, 1995 Comments and stated that it conducted negotiations in a fair and equitable manner (Commonwealth's March 15, 1995 Comments at 1-2). On

¹⁷ However, Cambridge stated that its proposal from the initial resource portfolio may not be cost-effective without consideration of environmental externalities (Cambridge's February 23, 1995 Filing).

¹⁸ The Companies also stated that Cambridge had concluded that arbitration provisions of its contract with SESCO were inapplicable, and Cambridge considered its contract with SESCO terminated.

¹⁹ SESCO provided documentation of contract negotiations between Commonwealth and SESCO during the period from February 1, 1995 through March 7, 1995 (SESCO March 10, 1995 Comments, Atts. 1-9).

March 16, 1995, the Companies submitted a status report on the process for securing replacement resources for the SESCO programs in the Cambridge and Commonwealth residential market sectors.

B. Positions of the Parties

1. SESCo

SESCo has petitioned the Department, pursuant to 220 C.M.R. § 10.06(2)(j) and 220 C.M.R. § 10.07(3) to review the contract negotiations between Commonwealth and SESCO regarding SESCO's proposed program for Commonwealth's residential non-electric heat sector (SESCo December 23, 1994 Petition at 7).²⁰ SESCO contends that Commonwealth's contract demands with respect to (1) the program completion security,²¹ (2) the front loading security,²² and (3) the level of payment obligation for energy savings delivered in any single year are contrary to the terms of the RFP, the Department's regulations, and SESCO's bid (id., SESCO's February 10, 1995 Reply at 3-4). SESCO states

²⁰ Pursuant to 220 C.M.R. § 10.06(2)(j), if after 30 days of negotiating, the parties cannot reach a settlement, the parties may petition the Department for a review. Pursuant to 220 C.M.R. § 10.07(3), a project developer aggrieved by an action of a company may petition the Department for an investigation. The Department, at its discretion, may open an investigation, and if it deems necessary, hold public hearings. Id.

²¹ SESCO contends that the program completion security is excessive and not consistent with the RFP, the Department's Order approving the RFP, and the IRM regulations (SESCo's February 10, 1995 Reply at 7-16). In addition, SESCO contends that it is not appropriate to impute to bidders knowledge of the RFP's completion security requirements from the Department's Order approving the RFP (id.).

²² SESCO contends that the front loading security is not mandated by the RFP or the Department's regulations, and that Commonwealth's demand for such security is inappropriate (SESCo's February 10, 1995 Reply at 16-19).

that it does not object to the standard form agreement, but the provisions sought by Commonwealth that are inconsistent with the standard form agreement (SESCo's February 10, 1995 Reply at 6).²³

2. Commonwealth

Commonwealth contends that the Department considered the security requirements that would be required of successful bidders in detail during its review of the RFP and found that the security provisions were appropriate and consistent with the IRM regulations (Commonwealth January 17, 1995 Response at 3).²⁴ Commonwealth also states that the RFP employed specific budget allocations to define the resource block being solicited, and that the Department directed the Companies to use their discretion to procure resources to the full amount of the budget in each rate category (id.). Commonwealth contends that it had the discretion to negotiate payments in excess of the milestone requirements of specific programs and that the RFP provided the Companies with the flexibility to manage the resource procurement process consistent with the budget limitations (id. at 4).

In addition, the Companies state that they engaged in substantial activities, including conducting a pre-bid conference and responding to potential bidder questions and requests for clarification, in order to explain the nature and requirements of the RFP (id. at 5).

²³ Specifically, SESCO objects to Commonwealth's attempt to insert a restriction on payments for installed measures to the kilowatthours necessary to satisfy the applicable milestone and to require any excess energy savings to be paid in future periods (SESCo's February 10, 1995 Reply at 19-20).

²⁴ Commonwealth states that the final form of the RFP approved by the Department included a requirement that the program completion security be tied to the bidder's milestone schedule (Commonwealth January 17, 1995 Response at 3).

Commonwealth contends that SESCo actively participated in this phase of the solicitation, and fully understood the nature and scope of the required security provisions and budget limitations prior to submitting its proposal (id. 5-6).

C. Analysis and Findings

The IRM regulations provide for an electric company and project developer to negotiate both price and non-price factors during contract finalization. 220 C.M.R. § 10.06(2)(l). The RFP approved by the Department provided the standard form energy savings agreement that would be the basis for any agreement with project developers (Exh. DPU-III-5, at 1-37). The security requirements of the RFP clearly indicated the types of security sought by the Companies as well as the acceptable security arrangements (id. at 1-38). The RFP provided that the program completion security will be an amount (submitted by the proposer and agreed to by the Companies) designed to protect the Companies and their customers (id.).²⁵ The Department left to the Companies' discretion the appropriate program completion security requirement.

With respect to the front load security, the RFP provided that the amount of security required shall vary with the amount of front loading of payments to a proposer and must be agreed to by the Companies (id. at 39). SESCo contends that Commonwealth's insistence on 100 percent front load security is not required by the Department's regulations (SESCo's February 10, 1995 Reply at 7-9). The Department left to the Companies' discretion the

²⁵ SESCo states that it did not submit a separately specified program completion security, and that the calculation of this security prescribed by the RFP are ambiguous (SESCo's February 10, 1995 Reply at 7-9).

appropriate front load security requirement.

The RFP also provided that the specifics of the security provisions would be finalized during contract negotiations (id. at 1-39 to 1-40). The security requirements are consistent with the RFP approved by the Department. Further, the Companies conducted substantial activities to explain the nature and requirements of the RFP, including its security provisions. SESCo had a full opportunity to and did avail itself of these activities.

The RFP approved by the Department provided significant flexibility to the Companies in the procurement of resources that provide exceptional value for their customers. D.P.U. 91-234-A at 17-18. Specifically, the Department required the Companies to procure resources within established budget limitations, and noted that the Companies were not obligated to accept any proposals, nor sign any contracts as a result of this solicitation (id.). The RFP also provided that the Companies may, at their discretion, negotiate payments for energy savings in excess of the anticipated delivery, but that such amounts must be consistent with the budget allocation (Exh. DPU-III-5, at 1-44). The Department's requirement that the Companies procure resources within established budget limitations was a paramount mandate, and the Companies were not given the discretion to exceed this constraint. Any payments for energy savings, whether for anticipated delivery or in excess of anticipated delivery (including bandwidths), that would exceed the established budget limitation are not consistent with the RFP. The Companies were charged with making this determination.

In light of the fact that the Department provided significant flexibility in the procurement of resources that provide exceptional value for customers, and because

Commonwealth contract negotiations fall within this discretion, the Department will not require Commonwealth to enter into an energy savings agreement with SESCO.²⁶

Because of the significant time that has transpired since the Companies' solicitation, the Companies may use their discretion to determine whether to replace any programs. See 220 C.M.R. § 10.05(4)(d). The Department directs the Companies to provide justification including updated information on the cost-effectiveness of any replacement programs.

²⁶ The Department has not based this finding on information contained in Commonwealth's February 17, 1995 Response. Therefore, SESCO's March 1, 1995 Motion to Strike and Commonwealth's March 8, 1995 Response are moot, and SESCO's February 10, 1995 Reply is due process. Further, based on SESCO's March 10, 1995 Comments and Commonwealth's March 15, 1995 Comments, the Department is satisfied that the contract negotiations were the result of a good faith attempt by both Commonwealth and SESCO to reach an agreement.

V. ORDER

After due consideration, it is

ORDERED: That the proposal to implement new construction programs of Cambridge Electric Light Company and Commonwealth Electric Company be and hereby is denied approval; and it is

FURTHER ORDERED: That Commonwealth Electric Company shall not be required to enter into an energy savings agreement with SESCo, Inc.; and it is

FURTHER ORDERED: That Cambridge Electric Light Company and Commonwealth Electric Company shall not replace resources from the Phase III award group, unless approved by the Department.

By Order of the Department,

Kenneth Gordon, Chairman

Mary Clark Webster, Commissioner

Janet Gail Besser, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).